STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 1, 2014
v	No. 312721 Wayne Circuit Court
ASHLY DRAKE SMITH, Defendant-Appellant.	LC No. 12-004553-FC

Before: GLEICHER, P.J., and SAAD and FORT HOOD, JJ.

GLEICHER, P.J., (*dissenting*).

The prosecutor charged defendant with several felonies including armed robbery, a capital offense carrying a potential sentence of life imprisonment. Despite the seriousness of the charges, defendant's counsel, Susan Reed, met privately with defendant only once: the night before trial. Despite that defendant had informed Reed of an alibi defense and provided the names and addresses of three alibi witnesses, Reed failed to investigate defendant's alibi. She met briefly with the alibi witnesses only once: the day of the trial. On the basis of this startling lack of preparation, Reed decided to forgo an alibi defense. The majority holds that Reed's choices were "strategic" rather than ineffective. Because a decision made without benefit of reasonable investigation may not be deemed strategic, I respectfully dissent.

I. PRETRIAL AND TRIAL PROCEEDINGS

Defendant's convictions rest solely on eyewitness identification testimony provided by Shawn Kelly. Kelly testified that at 7:20 p.m. on January 11, 2012, defendant and an accomplice entered Kelly's home through an unlocked door and proceeded to Kelly's bedroom. Kelly alleged that defendant pointed a gun and ordered Kelly to lay face-down on the floor. The robbers then began grabbing items from the room, including Kelly's marijuana, a cell phone, an iPad, and a PlayStation video game console. Kelly estimated that only a "matter of seconds" elapsed between the robbers' entry and the command that he lie on the floor. Within two minutes, Kelly recalled, the robbery was over.

Kelly, a Caucasian, believed he recognized defendant as a "racially mixed" individual he had previously seen at a bar and in the neighborhood. Rather than immediately reporting the robbery to the police, Kelly employed a laptop computer and Facebook "trying to find out" the name of the mixed-race person who had robbed him. Kelly admitted to being angry during this effort, and that he "also drank a little bit. So I was a little upset and it heightened the level of

anger." Based on responses to his computer inquiries, Kelly learned defendant's name. When Kelly's brother arrived home at "about" 9:10 p.m., Kelly called the police. He told the police that defendant had robbed him.

The next day, a detective created a six photograph lineup containing defendant's photo, and showed it to Kelly. Kelly identified defendant. Defendant was not arrested until March. The reason for this delay is unexplained in the record.

Reed was appointed to represent defendant on May 21, 2012. On June 4, 2012, Reed appeared at a "final conference" before Judge David Allen. Reed advised Judge Allen that she had not yet met with defendant. Reed nevertheless volunteered, "But I'm pretty sure we're going to be able to work this out."[1] Judge Allen scheduled a bench trial for August 20, 2012.

At the July 12, 2012 pretrial conference, Reed asked for an investigator, and Judge Allen granted this request. Reed's investigator never interviewed any of defendant's alibi witnesses, however. The investigator merely served the three witnesses with subpoenas, and all three appeared on the day of trial.

Reed met privately with defendant for the first time the night before trial. According to defendant, and unrebutted by Reed, the meeting consumed 15 minutes. Before this meeting, Reed had spoken with defendant "during . . . court proceedings" and "in the bullpen." Reed does not dispute that during these encounters defendant informed her of his alibi and provided her with the names and contact information for his witnesses.

Reed's trial theory was that Kelly had "singled out" defendant for identification "because of a racial animus." During cross-examination, Kelly admitted that while conducting his computer research, he made remarks "in a racial context." Reed did not elicit the substance of the remarks. Throughout his testimony, Kelly repeatedly insisted that he was "110% certain" that it was defendant who had robbed him. Under questioning by Judge Allen, Kelly volunteered, "You know for a couple of days after that because I wanted to be sure - - But you know the more I look back on it I was, you know I convinced myself I did see what I had seen. You know what I mean?"

At the conclusion of the prosecution's case, Reed stated. "Your Honor, I have subpoenaed witnesses on my client's behalf, but after the way the testimony has gone [] and [in] further discussion with my client I am not going to call the witness [sic]." Reed inquired of defendant, "Is that okay with you [?]," and defendant answered affirmatively. The defense rested. In conformity with Reed's advice, defendant did not testify. Judge Allen found defendant guilty. Appellate counsel moved to remand for a *Ginther* hearing.[2] This Court granted defendant's motion.

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[1] It remains a mystery how Reed could have determined that a plea was likely absent any discussion whatsoever with the accused.

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

II. THE *GINTHER* HEARING

Judge Mark Slavens conducted the *Ginther* hearing. Defendant called Reed as his first witness. Reed did not bring her file to the hearing, had not reviewed it before the hearing, and elected to testify based on her memory. Reed admitted that she met privately with defendant only on the evening before trial, that her "investigator" had not obtained any statements from the alibi witnesses or prepared any reports, that she never filed a notice of alibi defense as required under MCL 768.20(1), and that she made no mention of an alibi defense in her opening statement. She claimed to have talked to the alibi witnesses in a witness room on the day of trial and to have determined that they couldn't say that they had been with defendant "consistently" during the evening of the robbery.

Reed expressed that during the trial she "thought the case was going in such a way that the alibi witnesses might have be [sic] giving the prosecutor something to attack rather than focusing on their complainant." Reed agreed that her "decision was based on the idea that this identification was so weak that by putting on the alibi witnesses you didn't want to jeopardize the acquittal that you thought you were going to get." She further conceded that she had not considered filing a motion for directed verdict under MCR 6.419(C), and offered no explanation for this omission.

Defendant testified that on the day of the robbery, he was sick with the flu and spent the evening in his own apartment or in Sarah Urban's apartment, directly across the hall from the apartment he shared with Tim Mulroy. Defendant claimed that he remained in Urban's apartment throughout most of the evening, while also admitting that he occasionally returned to his apartment to use the bathroom or to speak to his girlfriend. Defendant recounted Reed visited him at the jail only once, for fifteen minutes on the evening before trial commenced.

Defendant asserted that during the trial, Reed advised him against calling the alibi witnesses who had appeared in the courtroom to testify on defendant's behalf. Defendant quoted Reed as stating, "I think the Judge is in your favor, I don't think there's any reason to do anything, I think it will destroy the opinion that the Judge has already made." Reed further informed defendant that she would not call the two female alibi witnesses because they were improperly dressed.

Sarah Urban testified that she and her two young daughters lived across the hall from defendant and that during the evening of the robbery she suffered from stomach flu which "was kind of going around the apartment." She recalled that defendant was in her apartment, lying on her couch watching movies for most of the evening. Urban readily admitted that defendant "may have went across the hall to his apartment to call his girlfriend, but for the most part we were at my apartment." At most, she asserted, defendant was gone for five to 10 minutes, and never for 20 or 30 minutes.[3] She explained that the evening stood out in her mind because:

[3] Record evidence indicates that the robbery occurred approximately four or five miles from the apartment complex.

> We were all super sick. It went around the whole entire apartment. I remember I had to stay home from work and watch my children, and that's probably about it. We were all so sick. I just remember laying around eating Chicken Noodle Soup.

Urban recounted that she spoke to Reed for the first time on the day of trial for "[n]ot even 15 minutes." Reed expressed displeasure with the way Urban was dressed, which Urban described as "black pants . . ., a black shirt, and some dress shoes."

Melissa Mulroy testified that she was also a neighbor of defendant, and spent the evening of the robbery in Urban's apartment. Mulroy recalled that defendant was there most of the time, and left "maybe once" for 20 minutes. Reed spoke to her for the first time on the day of trial and offered no explanation for not calling her as a witness.

Tim Mulroy, Melissa's brother, testified that he had been defendant's friend since seventh grade, and shared an apartment with him in January 2011. Tim Mulroy's affidavit averred that defendant spent the evening of January 11 on Urban's couch. At the hearing, Tim Mulroy testified that defendant was sick and had actually been asleep on a futon in their apartment rather than on Urban's couch. He recalled receiving a "very brief" call from Reed before the trial. On the day of trial, Reed informed him that the outcome was "a slam dunk" and there was no need for his testimony.

Judge Slavens concluded that Reed made "a strategic decision" not to call the alibi witnesses. He highlighted that the alibi witnesses' statements were "very inconsistent" and displayed "major differences." The inconsistencies, Judge Slavens reasoned, militated against a different outcome.[4]

III. ANALYSIS

"'[I]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.'" *United States v Cronic*, 466 US 648, 654; 104 S Ct 2039; 80 L Ed 2d 657 (1984), quoting *McMann v Richardson*, 397 US 759, 771 n 14; 90 S Ct 1441; 25 L Ed 2d 763 (1970). In *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984), the United States Supreme Court set forth the now familiar formula for an ineffective assistance claim: "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." To establish the first component, a defendant must show that counsel's performance fell below "an objective standard of reasonableness" under "prevailing professional norms." *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). With respect to the prejudice

[4] Judge Slavens apparently believed that the testimonies of Urban and Melissa Mulroy were inconsistent as to defendant's location during the evening of the robbery. Both testified that they were in Urban's apartment, sick with the flu, watching television and eating soup. Both testified that defendant was with them during most of the evening, and left only to go to his own apartment across the hall. Judge Slavens found: "both of them basically say that he's in their place." The record does not substantiate this finding, and in my view it constitutes clear error.

aspect, the defendant must demonstrate a reasonable probability that but for counsel's errors, the result of the proceedings would have differed. *Id*. at 663-664. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. The defendant must overcome the strong presumptions that his "counsel's conduct falls within the wide range of reasonable professional assistance," and that counsel's actions represented sound trial strategy. *Id.* at 689.

A defense counsel possesses "wide discretion in matters of trial strategy." *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007). And decisions regarding what witnesses to present are generally considered strategic, supporting relief only when the defendant is denied a substantial defense based on a witness's absence. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). This Court may not "substitute our judgment for that of counsel on matters of trial strategy, nor will we use the benefit of hindsight when assessing counsel's competence." *Id.* (quotation marks and citation omitted). However, "'[s]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. . . . Counsel has a duty to make a reasonable decision that makes particular investigations unnecessary.'" *People v Grant*, 470 Mich 477, 485; 684 NW2d 686 (2004) (second alteration in original), quoting *Strickland*, 466 US 668 at 690-691.

> "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." [*Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003), quoting *Strickland*, 466 US at 690-691.]

Reed's decision not to consult with defendant until the eve of trial, her neglect to file an alibi defense, and her failure to interview the alibi witnesses until the day of trial, were objectively unreasonable and deprived defendant of a substantial defense. I would hold that these unprofessional deficiencies undermine confidence in Judge Allen's verdict, thereby satisfying both *Strickland* prongs.

A. EFFECTIVENESS

Reed's first private meeting with defendant took place on the eve of trial. Although the need for consultation with an accused necessarily varies from case to case, I am hard pressed to conclude that a single short meeting, conducted within hours of a capital trial, objectively qualifies as reasonable. Here, the failure to meet with defendant in advance of the eleventh hour, combined with Reed's failure to personally interview the alibi witnesses, resulted in grossly inadequate representation. Reed was unprepared to consider presenting an alibi defense because absent reasonable investigation, she could not meaningfully comprehend the strengths or weaknesses of an alibi defense. Furthermore, Reed's failures to file an alibi notice and to move for a directed verdict of acquittal resulted from her lack of preparation rather than a considered strategy, and both missteps cost defendant a substantial defense.

The majority dispenses with Reed's failure to file an alibi notice by concluding: "the trial court exercised its discretion to conduct an orderly trial, and there is no indication that an untimely notice would have precluded the alibi defense." The majority's assumption of the trial court's willingness to disregard the law (and the prosecutor's indifference to this violation) does not excuse Reed's negligence. "[A] number of courts have found ineffective assistance of counsel in violation of the Sixth Amendment where, as in this case, a defendant's trial counsel fails to file a timely alibi notice and/or fails adequately to investigate potential alibi witnesses." *Clinkscale v Carter*, 375 F3d 430, 443 (CA 6, 2004) (citations omitted). The Sixth Circuit elucidated:

> At least where - as here - alibi is a critical aspect of a defendant's defense, there is nothing reasonable about failing to file an alibi notice within the time prescribed by the applicable rules when such failure risks wholesale exclusion of the defense. In this case, there would have been nothing to lose, yet everything to gain, from filing the alibi notice . . . . Such a course of action would have preserved Clinskcale's right to assert an alibi defense, but at the same time would not have tied him into asserting such a defense at trial. [*Id.*[5]]

Moreover, "[t]his Court will not . . . assess counsel's competence with the benefit of hindsight." *People v Garza*, 246 Mich App 251, 255; 631 NW2d 764 (2001). Rather, *Strickland* instructs that we must "evaluate the conduct from counsel's perspective at the time." *Strickland*, 466 US at 689. Viewed from Reed's perspective at the time, the record suggests no reasonable excuse for neglecting to disclose the possibility of an alibi defense. Nor does the record offer any guarantee that Reed's omission would have been overlooked. To the contrary, it is highly likely that the prosecutor would have strenuously objected to a last-minute, stealth alibi defense. My conclusion flows from the language of MCL 768.21(1): "If the defendant fails to file and serve the written notice prescribed in [MCL 768.20 and MCL 768.20a], the court *shall* exclude evidence offered by the defendant for the purpose of establishing an alibi or the insanity of the defendant." [Emphasis added]. Unlike the majority, I am unable to simply accept the belated and purely speculative proposition that both the trial court and the prosecutor would have blithely ignored Reed's inexcusable law-breaking.

The majority next rationalizes Reed's failure to interview the alibi witnesses as follows: "[A]fter speaking to the witnesses, Reed testified that she opted not to call them at trial because they could not account for defendant's whereabouts during the time period of the robbery." The majority misapprehends the evidence.

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[5] See also *Stewart v Wolfenbarger*, 468 F3d 338, 355 (CA 6, 2006) ("Michigan law unequivocally requires the defendant to list the location of the alibi, as well as the names of the alibi witnesses . . . . An objectively reasonable attorney would have complied with Michigan law in providing the correct alibi notice.").

All three witnesses placed defendant at his apartment complex during the time of the robbery. All three recall that defendant suffered from the stomach flu. Urban and Melissa Mulroy both testified that defendant remained in Urban's apartment throughout the evening except for brief (at most 20 minute) trips back to his own apartment to use the bathroom. Given the distance between defendant's apartment and the scene of the crime and the evening's circumstances, the witnesses' testimonies rendered it unlikely that an ill defendant would arise from Urban's couch, drive to another location and conduct an armed robbery, only to return and continue watching television.[6] And to the extent that Reed rejected Urban's testimony based on Urban's attire, Reed's negligence is readily apparent; a pretrial telephone conference likely would have eliminated that problem.

Furthermore, the record reveals no reason that Urban and Melissa Mulroy would have been considered incredible by Judge Allen or any factfinder. Although their testimonies displayed a single, relatively minor inconsistency as to the time that defendant was absent from Urban's apartment (five to 10 minutes versus 20 minutes at most), no evidence suggests that the robbery could have been accomplished in 20 minutes. More to the point: minor inconsistencies often enhance credibility and are often resolved by careful review of the evidence in advance of trial. In my view, Reed's criticism of the witnesses' alibi testimony reflects the seriousness of her own failure to prepare an alibi defense, which should have included evidence that the robbery could not have been completed in 20 minutes.

"Moreover, the alibi defense was completely consistent with, and in fact complimentary to, trial counsel's theory of mistaken identification." *Foster v Wolfenbarger*, 687 F3d 702, 708 (CA 6, 2012). The Sixth Circuit explained in *Foster* that an alibi defense may potentially bolster an argument that a witness misidentified the accused. Reed's justification for electing against an alibi defense – that the identification was "so weak" the alibi witnesses could have jeopardized an acquittal – simply makes no sense. Even if Reed had correctly judged the strength of Kelly's testimony – which she had not – alibi testimony would have made it more likely that Kelly "got the wrong man" during his Facebook research.

Reed's failure to move for a directed verdict of acquittal further highlights her ineffectiveness. Reed offered no explanation for this omission. At the time of defendant's trial, MCR 6.419(C) provided:

> Bench Trial. In an action tried without a jury, after the prosecutor has rested the prosecution's case-in-chief, the defendant, without waiving the right to offer evidence if the motion is not granted, may move for acquittal on the ground that a reasonable doubt exists. The court may then determine the facts and render a verdict of acquittal, or may decline to render judgment until the close of all the

[6] While Tim Mulroy placed defendant in his apartment rather than Urban's, this discrepancy potentially resulted from the erosion of Mulroy's memory over time. Had Reed met with the witnesses soon after her appointment as defense counsel, she could have determined which of them remembered the events most clearly and credibly.

evidence. If the court renders a verdict of acquittal, the court shall make findings of fact.

This court rule afforded Reed an opportunity to make an informed, considered decision whether to present any of the alibi witnesses. Rather than simply resting without presenting any evidence, Reed likely would have determined that her cross-examination of Kelly had failed to generate reasonable doubt of defendant's guilt. In accordance with Reed's "logic" that weak alibi testimony would somehow strengthen the identification testimony, a directed verdict motion would not have jeopardized an acquittal flowing from inadequate identification evidence. Once having lost the motion, Reed would have had nothing to lose by presenting alibi evidence.

In my view, Reed's decision to forgo an alibi defense was the product of an incomplete, eleventh-hour, objectively unreasonable investigation. A reasonable attorney would have met with the alibi witnesses well before trial to assess their credibility and to fully understand the evening's events. This is especially true given that defendant's only real hope of an acquittal rested on convincing the trial court that Kelly's identification was mistaken. Alibi evidence would have moved defendant far closer to that goal.

I cannot agree with the majority that an objectively reasonable defense may be constructed the night before and the day of a capital trial. Even experienced trial counsel must prepare to defend a capital case. In my view, the evidence persuasively demonstrates that Reed lacked any reasonable justification for failing to interview the alibi witnesses before trial, and for failing to present at least one of their testimonies.

B. PREJUDICE

Judge Slavens and the majority conclude that a factfinder "would not have found the testimony [of the alibi witnesses] believable," and thus Reed's failure to present them made no difference in the outcome of the case. The second *Strickland* prong requires defendant to establish a "reasonable probability" of a different outcome, which *Strickland* defines as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 US at 694. A reasonable probability does not require certainty; nor does it consist of a mere possibility that "a reasonable doubt might have been established if counsel acted differently. Instead, *Strickland* asks whether it is 'reasonably likely' the result would have been different." *Harrington v Richter*, 562 US __; 131 S Ct 770, 791-792; 178 L Ed 2d 624 (2011) (citations omitted). My confidence in Judge Allen's verdict is undermined by Urban and Melissa Mulroy's testimonies.[7]

[7] Tim Mulroy is less persuasive because unlike the two women, he placed defendant in his (defendant's) apartment. This discrepancy may well have disappeared had Reed interviewed the witnesses while their memories were fresher, rather than at the last possible moment. As the Court of Appeals for the Second Circuit has explicitly recognized, "[T]here is nothing as dangerous as a poorly investigated alibi. An attorney who is not thoroughly prepared does a disservice to his client and runs the risk of having his client convicted even where the prosecution's case is weak. A poorly prepared alibi is worse than no alibi at all." *Henry v Poole*, 409 F3d 48, 65 (CA 2, 2005) (quotation marks and citation omitted).

I believe that a reasonable likelihood exists that a factfinder hearing the alibi evidence would have harbored reasonable doubt regarding defendant's guilt.

Kelly's eyewitness testimony, as Reed correctly assessed, was far from airtight. Kelly saw his assailant for only seconds before lying face-down on the floor, delayed calling the police, admitted to illegal marijuana sales, and expressed racial animus during his personal computer investigation. By Kelly's own estimate, the robbery was completed within about two minutes, and Kelly's view of the assailant wielding the gun was fleeting. Tellingly, Kelly stated: "You know for a couple of days after that because I wanted to be sure – But you know the more I look back on it I was, *you know I convinced myself I did see what I had seen*. You know what I mean?" (Emphasis added.) Well-meaning eyewitnesses sometimes convince themselves that an identification is accurate, particularly after publicly committing to it. See *United States v Cook*, 102 F3d 249, 252 (CA 7, 1996) ("[E]yewitnesses may give unreliable testimony, because of the shortcomings of memory, the difficulty of categorizing facial features of other ethnic groups, and the tricks the mind plays on people desperate to pin the blame on someone."). Reed perceived that the circumstances surrounding Kelly's identification of defendant rendered his testimony especially vulnerable to challenge. And other than Kelly, the prosecution presented no evidence linking defendant to the crime.

Judge Slavens discredited defendant's alibi witnesses solely based on the "inconsistencies," which he characterized as "big differences" in their testimonies. As discussed above, Urban and Melissa Mulroy substantially agreed that defendant was sick with the stomach flu and spent the evening of the robbery lying on Urban's couch, except for brief intervals when he returned to his own apartment across the hall. In my view, the persuasiveness of this testimony was for the factfinder, and not Judge Slavens, to determine. See *Ramonez v Berghuis*, 490 F3d 482, 490 (CA 6, 2007) ("While there would have been plenty of grist for the cross-examination mill as to Ramonez's three witnesses, the question whether those witnesses were believable for purposes of evaluating Ramonez's guilt is properly a jury question.").

A jury *may* have determined that the inconsistency between the times of defendant's absence from Urban's apartment eliminated the integrity of the alibi testimony. However, there is a reasonable probability that a jury would have found that defendant was, in fact, ill with the stomach flu, prostrate on Urban's couch for most of the evening, and returned to his own apartment during intervals too short to have driven to Kelly's place to conduct an armed robbery. In other words, while not conclusive as to defendant's whereabouts every moment that evening, the testimony most assuredly cast reasonable doubt that defendant robbed Kelly.

Moreover, as the Sixth Circuit explained in *Brown v Smith*, 551 F3d 424, 434-435 (CA 6, 2008), "Where there is relatively little evidence to support a guilty verdict to begin with (e.g., the uncorroborated testimony of a single witness), the magnitude of errors necessary for a finding of prejudice will be less than where there is greater evidence of guilt." The weaknesses of Kelly's testimony enhance the prejudicial impact of Reed's unreasonable failure to present the testimony of at least Urban and Melissa Mulroy.

Had Reed performed effectively, she would have investigated and sorted out the alibi testimony well in advance of trial, filed an alibi notice, and based her decision whether to proceed with the alibi evidence on Judge Allen's directed verdict ruling. Assuming that Judge

Allen found that Reed's cross-examination failed to create reasonable doubt, I believe that the alibi evidence would have done so. Absent presentation of this readily-available evidence, the accuracy of the guilty verdict deserves no confidence. Accordingly, I respectfully dissent.

/s/ Elizabeth L. Gleicher